A

DATO' ROBERT TEO KENG TUAN

v.

METROPLEX BHD

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
C AHMAD MAAROP FCJ
[CIVIL APPEAL NO: 02(i)-70-10-2012(W)]
21 OCTOBER 2013

D ***COMPANY LAW:*** *Liquidators - Provisional liquidator - Claim for valuer's fees/costs - Valuer appointed by provisional liquidator - Reasonableness of costs - Whether question of fact to be determined by trial court - Whether trial court had meticulously embarked on careful judicial appreciation and assessment of evidence - Whether s. 232(2) Companies Act 1965 applicable - Whether appeal should be allowed*

E ***CIVIL PROCEDURE:*** *Appeal - Appeal to Federal Court - Provisional liquidator's claim for valuer's fees/costs - Valuer appointed by provisional liquidator - Reasonableness of costs - Whether question of fact to be determined by trial court - Whether trial court had meticulously*
F *embarked on careful judicial appreciation and assessment of evidence*

The appellant, a provisional liquidator ('PL') of the respondent company, was appointed by the High Court with a specific mandate to ascertain the disposal alternatives and to submit a report on the current market value of Putra Place. After
G completing her task, the PL filed an application for, *inter alia,* her appointed valuer's fees amounting to RM333,919.50 and HKD16,000 respectively. However, the High Court Judge dismissed the PL's claim in relation to the valuer's fees/costs in procuring the valuation report from Knight Frank, a valuation firm
H from Hong Kong. On appeal, the Court of Appeal dismissed the PL's appeal. Hence, this appeal. The central issue that arose was whether the costs sought by a PL was reasonable or otherwise in relation to the performance of the court's mandate to the PL.

I

Held (dismissing appeal with costs)
Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) Section 232(2) of the Companies Act 1965 only refers to the PL's salary or remuneration. It does not apply to fees or costs of the valuer appointed by the PL. The question of reasonableness of the costs of the valuer is essentially a question of fact to be determined by the trial judge (*Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications;* refd). (paras 21 & 28)

(2) In relation to the appointment of Knight Frank, there was no evidence to show that the views of the respondent were sought before the appointment was made. Nor was there any evidence to show any compelling reason for the appointment of a valuation firm from Hong Kong to do the valuation. It was also not shown that a local Malaysian valuation firm could not have done the job. Further, it was observed that there was a marginal difference of 0.98% only between the valuation done by Knight Frank and that done by CH Williams Talhar, a local firm. (para 23)

(3) The issue of reasonableness of the costs incurred was well within the discretion and prerogative power of the learned High Court Judge on whether to allow or dismiss the PL's claim based on the evidence before the court. The High Court Judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced before the court. Likewise, the Court of Appeal had not erred in affirming the decision of the High Court. Thus, there was no reason for this court to interfere and it was also unnecessary to answer the question posed in this appeal as the appeal had no chance of success, being a decision based on the discretion of the High Court on a factual issue. (para 26, 27 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, penyelesai sementara ('PS') syarikat responden, telah dilantik oleh Mahkamah Tinggi untuk suatu mandat spesifik bagi menentukan pelupusan alternatif dan mengemukakan satu laporan berkenaan nilai pasaran terkini bagi Putra Place. Setelah menyelesaikan tugasnya, PS memfailkan permohonan untuk, antara lain, fi penilai yang dilantik masing-masing berjumlah RM333,919.50

dan HKD16,000. Walau bagaimanapun, Hakim Mahkamah Tinggi menolak tuntuan PS berkenaan fi/kos penilai dalam memperolehi laporan penilaian daripada Knight Frank, suatu firma penilaian di Hong Kong. Atas rayuan, Mahkamah Rayuan menolak rayuan PS. Oleh itu, rayuan ini. Isu yang dibangkitkan adalah sama ada kos yang dituntut oleh PS adalah munasabah atau sebaliknya berkaitan dengan pelaksanaan mandat mahkamah terhadap PS.

Diputuskan (menolak rayuan dengan kos)
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 232(2) Akta Syarikat 1965 hanya merujuk kepada gaji PS. Ia tidak terpakai kepada fi atau kos penilai yang dilantik oleh PS. Persoalan berkenaan kemunasabahan kos penilai merupakan persoalan fakta yang perlu diputuskan oleh hakim bicara (*Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications;* dirujuk).

(2) Berkenaan pelantikan Knight Frank, Mahkamah Tinggi memutuskan bahawa tiada keterangan yang menunjukkan bahawa pendapat responden telah diminta sebelum pelantikan dibuat. Tiada keterangan yang menunjukkan sebarang alasan bagi pelantikan firma penilaian dari Hong Kong untuk membuat penilaian. Juga tidak ditunjukkan bahawa firma penilaian tempatan di Malaysia tidak mampu membuat kerja tersebut. Selanjutnya, terdapat perbezaan marginal hanya sebanyak 0.98% antara penilaian yang dibuat oleh Knight Frank dan yang dibuat oleh CH Williams Talhar, sebuah firma tempatan.

(3) Isu kemunasabahan kos yang ditanggung adalah dalam budi bicara dan hak prerogatif Hakim Mahkamah Tinggi sama ada hendak membenarkan atau menolak tuntutan PS berdasarkan keterangan yang dikemukakan di mahkamah. Hakim Mahkamah Tinggi telah, secara teliti, menjurus kepada pertimbangan kehakiman dan penilaian keterangan yang dikemukakan di mahkamah. Sama seperti itu, Mahkamah Rayuan tidak khilaf dalam mengesahkan keputusan Mahkamah Tinggi. Oleh itu, tiada sebab untuk mahkamah ini campur tangan dan soalan yang dikemukakan dalam rayuan ini tidak perlu dijawab disebabkan rayuan ini tidak mempunyai peluang untuk berjaya, memandangkan ia adalah suatu keputusan berdasarkan budi bicara Mahkamah Tinggi atas isu fakta.

Case(s) referred to:

Australian Securities And Investments Commission v. Rowena Nominees Pty Ltd (In Liq) [2006] 225 ALR 147 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Venetian Nominees Pty Ltd v. Conlan [1998] 16 ACLC 1653 ***(refd)***

Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 232(2), 236(1), (2)

Companies (Winding-up) Rules 1972, r. 173

For the appellant - Ng Sai Yeang (Mark Yu Kee La Brooy & Hew Sheau Ying with him); M/s Raja, Darryl & Loh

For the respondent - Wong Rhen Yen (Goik Kenwayne with her); M/s Dennis, Nik & Wong

[Appeal from Court of Appeal; Civil Appeal No: W-02(IM)-2375-2009]

Reported by Kumitha Abd Majid

JUDGMENT

Hashim Yusoff FCJ:

[1] This is an appeal by the appellant against the decision of the Court of Appeal which affirmed the decision given by the High Court in dismissing the appellant's claim for her appointed valuer's fees.

Background Facts

[2] The appellant was the Provisional Liquidator ('PL') of the respondent company appointed by the Kuala Lumpur High Court on the 15 June 2006 with a specific mandate ie:

(i) to ascertain the disposal alternatives for Putra Place; and

(ii) to submit a report on the current market value of the Putra Place.

[3] After completing her task, the PL then filed an application (encl. 134) for remuneration on 12 December 2006 for three prayers:

A (a) Her remuneration as PL;

(b) Her appointed valuer's fees amounting to RM333,919.50 and HKD16,000 respectively; and

B (c) Her solicitors' fees.

At The High Court/Court Of Appeal

[4] The learned High Court Judge partially allowed the appellant's claim (encl. 134) in that:

C (i) Prayer 1 (PL's remuneration) was to be referred to the Deputy Registrar to determine the reasonable amount claimed by the PL; and

(ii) Prayer 3 in the sum of RM13,047 being her solicitor's costs
D was also allowed.

[5] But prayer 2 ie, the PL's claim for valuer's fees/costs in procuring the valuation report from Knight Frank was dismissed.

E **[6]** The appellant's appeal to the Court of Appeal against this order was also dismissed. Leave was subsequently given by this court to the appellant on the following question:

> Whether in an application under Section 232 of the Companies Act 1965, to determine the reasonableness of the amounts sought
F by a provisional liquidator, the court ought to confine itself to the evidence at hand, relating to the reasonableness of the costs sought in relation to the performance of court's mandate to the Provisional Liquidator.

Appellant's Submission

G

[7] Learned counsel for the appellant submitted that the appellant/PL was entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the court, as provided under s. 232(2) of the Companies Act 1965.

H

[8] At stake was a sale of the Putra Place land and the Legend Hotel by the respondent to the employees provident fund which the petitioner/appellant was challenging.

I **[9]** It was contended that there was no dispute that the costs of procuring the mandated valuations were to be borne by the respondent. This was so stated in the High Court Order dated

23 May 2006 (see pp. 7 - 13 of the core bundle (CB)) and the subsequent High Court Order dated 15 June 2006 (see 15 of the CB).

[10] Based on the above two High Court Orders, the appellant had procured two valuation reports from Knight Frank giving the valuation of the Mall and 100 Putra Place together, and the valuation of the Legend Hotel. Knight Frank also issued two separate invoices for the valuations done *viz*:

(i) RM217,741.40 for the valuation of the Mall; and

(ii) RM116,178.50 for the valuation of the Legend Hotel.

[11] Appellant's counsel further submitted that according to sch. A para. (g) of the High Court Order dated 23 May 2006, the PL is conferred the power, "To commission any valuation reports as to the value of any of the Putra Place Land as the Provisional Liquidator deems fit and that the costs of such valuation report(s) be paid for by the respondent out of the assets of the respondent."

[12] Counsel also referred to the case of *Australian Securities And Investments Commission v. Rowena Nominees Pty Ltd (In Liq) (rec and mgr apptd) (supervisor apptd) (ACN008 818 273)* - [2006] 225 ALR 147. The Supreme Court of Western Australia *inter alia* held (v):

> Adopting a broad-brush approach, remuneration of $200,000 would be reasonable in the circumstances. This amount made no allowance for the period during which Conlan was acting as liquidator and supervisor, and took into account the amounts already paid to Conlan by GWA. It also took into account the court's conclusion that it was not established that work done since the termination of his appointment as supervisor had been conducted in a way that was of benefit to creditors.

Respondent's Contention

[13] Learned counsel for the respondent however responded by submitting that s. 232(2) of the Companies Act 1965 refers only to the remuneration of the PL. It does not apply to fees of the valuers appointed by the PL.

[14] He further submitted that the applicable rule is r. 173 of the Companies (Winding-up) Rules 1972, which reads:

> No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payment for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the taxing officer. The taxing officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of $100.

[15] It was also submitted by learned counsel for the respondent that the invoice sent by Knight Frank Petty, dated 31 August 2006, (see AR vol. 5/7 at p. 906) RE: METROPLEX MALAYSIA professional fees pertaining to valuation services to review the property under 3.0 of project overview (8 hrs x HK$2,000) shows its address as:

> Knight Frank Petty Ltd.
> 4/F Shui On Centre
> 6-8 Harbour Road
> Wanchai
> Hong Kong

[16] That being so, it was argued that as found in the grounds of judgment of the learned trial judge, that the views of the respondent was not sought in the preparation of the valuation reports and that there was no compelling reason for the appointment of a valuation firm from Hong Kong to do the valuation. There was also no evidence to suggest that a local valuation firm could not have done the same job as the valuer from Hong Kong.

[17] The valuation reports prepared by Knight Frank and the valuation report prepared earlier by CH Williams Talhar, a local firm showed a marginal difference of 0.98% only. (See AR vol. 6/7 p. 1095).

[18] Reference was also made to the Federal Court decision in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629. In that case, "the respondents were liquidators of Folin and Brothers Sdn Bhd ('Folin') which was wound up by order of court. The appellants, who owned 75% of Folin's shareholding, applied to the High Court to have the respondents removed as liquidators under s. 232 of the Companies Act 1965 ('the Act'). One of the grounds cited in support of their application was that the respondents had paid the bills of lawyers engaged by them to act for Folin without requiring the bills to be taxed pursuant to r. 173 of the Companies (Winding-Up) Rules 1972. The bills in question related to litigation matters that involved the appellants, the respondents, Folin and its wholly-owned subsidiary, Folin Food. The High Court dismissed the application and with regard to the ground concerning the taxation of the bills, it held that r. 173 only applied to services rendered by an advocate in assisting a liquidator perform his ordinary administrative and management duties as envisaged by s. 236(1) of the Act. The services for which the lawyers were engaged in the present case were for defending an action on Folin's behalf under s. 236(2) of the Act. Furthermore, the cheques for payment of the lawyer's bills were signed by the respondents only after the appellants had approved the payments. The Court of Appeal upheld the High Court's decision on appeal. The appellants were granted leave to appeal to the Federal Court.

Held: (1) Rule 173 was meant to only apply to services envisaged under s. 236(1) of the Act. It was clear the services referred to were those rendered to the liquidator in the performance of his ordinary administrative and management duties. In the present case, the advocate's services were for bringing and defending action on behalf of Folin under s. 236(2) of the Act. Therefore, they did not fall under r. 173 (see paras. 15 & 17)."

A **Court's Decision**

[19] The central issue in the leave question is the determination whether the costs sought by a PL is reasonable or otherwise in relation to the performance of the Court's mandate to the PL.

B **[20]** The appellant based her application on s. 232(2) of the Companies Act 1965 which states:

> (2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of
C percentage or otherwise as is determined by the Court.

[21] We agree with learned counsel for the respondent that s. 232(2) of the Companies Act 1965 only refers to the PL's salary or remuneration. It does not apply to fees or costs of the
D valuer appointed by the PL.

[22] Such fees of the valuer so appointed by the PL can be more appropriately applicable under r. 173 of the Companies (Winding-Up) Rules 1972 which reads:

E > No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers or other persons other than payments for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof
F that the same have been considered and allowed by the Taxing Officer. The Taxing Officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been
G duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of RM100.

H **[23]** As to the appointment of Knight Frank, the learned High Court Judge found that there was no evidence to show that the views of the respondent were sought before the appointment was made. Nor was there any evidence to show any compelling reason for the appointment of a valuation firm from Hong Kong to do the
I valuation. It was also not shown that a local Malaysian valuation firm could not have done the job. There was also no evidence to

show that the fees charged by Knight Frank were competitive. The learned High Court Judge further observed that there was also a marginal difference of 0.98% only between the valuation done by Knight Frank and that by CH Williams. Having scrutinised the evidence before him, the learned High Court Judge said that the burden was on the PL/appellant to show that her remuneration was justified and therefore the PL was on an obligation to put sufficient information before the court to determine whether the costs are reasonable. (See *Venetian Nominees Pty Ltd v. Conlan* [1998] 16 ACLC 1653) at p. 1657. This the learned judge found the PL had failed to do.

[24] On the appointment of Knight Frank by the PL to prepare the reports, the Court of Appeal held that the learned High Court Judge had correctly dismissed the PL's claim for the reasons as stated in his ground of judgment as mentioned earlier. It further held that it must be stressed that the PL, once appointed, owed the respondent a fiduciary duty to act fairly and objectively in the interest of the respondent. The Court of Appeal agreed that the learned High Court Judge had correctly concluded that in breach of their fiduciary duty the PL had failed to ensure that the fees was competitive.

[25] As submitted by learned counsel for the respondent, the appellant's solicitors themselves had conceded that there was no evidence in the affidavit to show that the liquidator has made any effort to look for alternative buyers of the property besides what was mentioned in the valuation report.

[26] We also agree with the respondent's counsel's submission that the issue of reasonableness of the costs incurred is well within the discretion and prerogative power of the learned High Court Judge whether to allow or dismiss the PL's claim based on the evidence before the court. And the learned High Court Judge had meticulously embarked on a careful judicial appreciation and assessment of the evidence adduced before the court and for good reasons dismissed prayer 2 in the PL's application. Likewise we find the Court of Appeal had not erred in affirming the said decision of the High Court.

[27] We find both the courts below were not wrong in coming to that decisions as they did. As such there is no reason for us as the apex court to interfere. (See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[28] The question of reasonableness of the costs of the valuer is essentially a question of fact to be determined by the trial judge. As stated by this court in the case of *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25:

> Held, (5) Once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal *in limine* was not brought to the attention or overlooked by the leave panel.

[29] As stated earlier, we find no reason to disagree with the decision of the Court of Appeal in affirming the decision of the High Court in this matter. We therefore find it is unnecessary to answer the question posed before us as the appeal has no chance of success being a decision based on the discretion of the High Court on a factual issue.

[30] For the above reasons, we would dismiss this appeal with costs.